FILE COPY

No 183

FILED
JUN 13 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

RALPH HENRY CAHOON, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

HAYDEN C. COVINGTON
Counsel for Petitioner

INDEX

Subject Index

	PAGE
Title of court and of cause	*Front cover*, 1
This Index	i-iv
Petition for writ of certiorari	1-16
Opinions of court below	1
Jurisdiction	1
Timeliness of this petition	2
Statutes and Regulations involved	2
Questions presented	2-4
Statement of case	4-12
Form of action	4
Facts	5
How issues were raised	12
Specifications of error	14
Reasons relied on for granting the writ	14
Conclusion	16
Supporting Brief	17-32
Preliminary	17
Argument	17-31
Conclusion	32

CITATIONS

Cases

PAGE

Baldwin v. McClinch
1 Mo. (1 Green) 102, 107 24

Baltimore Carolina Line v. Redman
295 U. S. 654 24

Billings v. Truesdell
321 U. S. 542, 546, 553, 554, 555 29

Bridges v. Wixon
326 U. S. 135, 156-157 ..... 15, 21

Cain, Ex parte
39 Ala. 440, 441 24

Dodez v. United States
Pending in this court on certiorari (granted May 6, 1946), No. 1103 Oct. Term 1945, 14 LW 3386:
Petition for writ of certiorari, pp. 13-18 30

Estep v. United States
— U. S. —, 66 S. Ct. 423, 425-429
(No. 292 Oct. Term 1945) 2, 14, 25, 30
Joint brief for petitioners, pp. 130-190 24

Falbo v. United States
320 U. S. 549 ..... 25, 29, 31

Gibson v. United States
Pending in this court on certiorari (No. 221 Oct. Term 1945, for reargument at October Term 1946):
Brief for petitioner, pp. 16-24 30

Haggin v. Haggin
35 Neb. 375, 53 N. W. 209, 211 24

Keegan v. United States
325 U. S. 478, 493-494 ..... 15, 26

Kidder v. French
N. H., Smith, 155, 156 24

Lehr v. United States
139 F. 2d 919, 921-922 24

Londonderry v. Chester
2 N. H. 268 24

Cases continued

PAGE

Morgan v. United States
298 U. S. 468, 479-481 (1936) 21

Murdock v. Pennsylvania
319 U. S. 105 24

Ohio Bell Tel. Co. v. Public Utilities Comm'n
301 U. S. 292, 300, 302, 303 (1937) 20

Okamoto v. United States
152 F. 2d 905 (CCA-10) 15, 27

Pearson v. United States ex rel. Horowitz
151 F. 2d 801 (CCA-3), cert. granted May 27, 1946,
14 LW 3419, No. 947 Oct. Term 1945 ..... 15, 17

Reinhart, In re
9 Ohio S. & C. P. Dec. 441, 445 24

Smith v. United States
150 U. S. 50 24

Smith v. United States
148 F. 2d 288 25
— U. S. —, 66 S. Ct. 423, 425-429 (No. 66 Oct. Term 1945) 14
Record, pp. 2-3 5
Joint brief for petitioners, pp. 130-190 24

Stanziale, Ex parte
138 F. 2d 312 (CCA-3) 31

Tung v. United States
142 F. 2d 919 (CCA-1) 31

United States v. Grieme
128 F. 2d 811 (CCA-3) 27

United States v. Hoffman
137 F. 2d 416 (CCA-2) 27

United States v. Lair
52 F. Supp. 393 (USDC-ND-Calif.) 31

United States v. Murdock
290 U. S. 389, 394 6

United States v. Peterson
53 F. Supp. 760 (USDC-ND-Calif.) 31

United States ex rel. Levy v. Cain
149 F. 2d 328 (CCA-2) 15, 17

Statutes and Regulations

	PAGE
Criminal Appeals Rules, Rules XI and XIII	2
Judicial Code, sec. 240 (a), as amended by Act of Feb. 13, 1925	1-2
Selective Service Regulations (32 C. F. R. 601.5 et seq.), section—	
622.21	19
622.22	18
622.25-1	19
622.44	2
622.51	2
623.1 (c)	2, 22
623.2	2, 19
627.24 (b)	2, 18
627.25	2
629	2
629.1	29
United States Code, Title 50 App. Secs. 301-318 ["Selective Training and Service Act of 1940" as amended, secs. 3 (a), 5 (d), 10 (a), 11]	2, 12
Sec. 303 [3 (a)]	29
United States Constitution, Amendment V	2, 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

RALPH HENRY CAHOON, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Ralph Henry Cahoon, Jr., petitions this court for a writ of certiorari. He shows unto the court as follows:

1. *Opinions of the court below.*

The original opinion of the United States Circuit Court of Appeals is reported at 152 F. 2d 752 and also appears in the record. [239-240] * The opinion of the court upon the petition for rehearing is not yet reported in the Federal Reporter, but also appears in the record. [261-263]

2. *Jurisdiction.*

The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of

* Bracketed figures appearing in this petition and the supporting brief refer to pages of printed transcript of the record.

February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court on May 7, 1934.

3. *Timeliness of this petition.*

The judgment of affirmance was rendered and entered January 9, 1946. [241] Time to file a petition for rehearing was enlarged until fifteen days after the decision of this court in *Estep* v. *United States*, No. 292, October Term 1945. [241] The petition for rehearing was filed February 15, 1946. [242] The petition was denied April 25, 1946. [261-263] Upon application duly made the time for filing petition for writ of certiorari was enlarged to and including June 15, 1946. The petition for writ of certiorari is filed within the enlarged time.

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 622.44, 622.51, 623.1 (c), 623.2, 627.24 (b), 627.25 and 629 of the Selective Service Regulations (32 C. F. R. 601.5 *et seq.*) promulgated by the President under said Act.

5. *Questions presented.*

(1) Is the classification of petitioner by the board of appeal, whose members considered a brief about Jehovah's witnesses prepared by a lawyer-member of the board of appeal, based upon a book—hearsay evidence—bought by such lawyer two years previously, which information was outside the record and file, a violation of the Act, the Regulations and the due process clause of the Fifth Amendment to the Constitution of the United States?

(2) Was the summary disposition of petitioner's appeal, and the denial of his claim for exemption as a minister of religion, because he was one of Jehovah's witnesses a

classification by the board of appeal based on prejudice and bias contrary to the Act, the Regulations and the due process clause of the Fifth Amendment to the Constitution of the United States?

(3) Does the undisputed evidence show, as a matter of law, that petitioner was denied due process of law by the administrative agency so as to require a dismissal of the indictment and a remand of the draft board file to the administrative agency for further proceedings not inconsistent with the Act and Regulations?

(4) Where the undisputed evidence shows that the board of appeal was prejudiced against petitioner and violated his rights to procedural due process by denying him a full and fair hearing, may he show in defense to the indictment that the administrative agency acted illegally and unconstitutionally, and that the order on which the indictment is based is void?

(5) Did the trial court err in holding, as a matter of law, and in charging the jury, that the determination of the administrative agency on whether petitioner was exempt from training and service as a minister of religion, was not a matter for the determination of the court or jury in defense to the indictment charging petitioner with defiance of the order to report for induction?

(6) Did the trial court err in refusing to hold, and in refusing the jury the right to consider, that the order on which the indictment was based is void, because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) contrary to the undisputed evidence, (e) without support of substantial evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

(7) Did the trial court err by instructing the jury, in effect, to convict petitioner under the indictment, when he told the jury that there was no denial of a full and fair hearing and the issue of whether petitioner was exempt as a minister of religion was not for the court or jury to decide?

(8) Did the court below err in holding harmless and immaterial error the denial of due process of law by the trial court which held and instructed the jury that the action of the administrative agency was not a matter for consideration of the court or jury in defense to the indictment?

(9) Did the trial court err in refusing to charge the jury that it could consider petitioner's honest good-faith belief that he was exempt because a minister of religion and thereby could not take the oath of induction, as a defense to the charge that he knowingly, willfully and unlawfully refused to comply with the order?

(10) Does the undisputed evidence show that petitioner did not fail to report for induction as charged in the indictment?

Statement of Case

Form of Action

This criminal action was instituted in the District Court of the United States for the Southern District of Texas by return of an indictment charging defendant with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [8]

The indictment charged that petitioner, a registrant classified for training and service in the armed forces "did knowingly, wilfully and feloniously fail and neglect to report and submit himself to induction into armed forces

of the United States, in accordance with the order of the Local Draft Board." [9] *

Thereafter petitioner pleaded "not guilty". [14] The trial to a jury before the court began on February 27, 1945. [10] The Government presented its case to the court and rested, where upon petitioner moved for an instructed verdict. [70-71] The motion was denied with exception to petitioner. [70, 71] Again, at the close of all the evidence, petitioner moved for an instructed verdict and again his motion was denied, with exception to him. [216-217] Then, after counsel argued the case, the court charged the jury. [218-222] A special charge which petitioner had timely requested was denied, with exception. [222-223, 225-226] The jury returned its verdict of guilty on February 28, 1945, and judgment was promptly pronounced thereon. [226-227] On March 1, 1945, the court entered final judgment, committing petitioner to the custody of the Attorney General for a period of 13 months. [228]

Petitioner then moved for a new trial, but this motion was overruled, with exception. [229-230]

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. [236-237] He also timely filed his assignments of error which support each ground of this petition for writ of certiorari. [232-236]

Facts

Cahoon, now 20 years of age, registered under the Selective Training and Service Act of 1940, on October 4, 1943, with Harris County Local Board No. 9, at Houston,

* This is substantially the same allegation that appears in the indictment returned against petitioner in Smith v. United States, No. 66 October Term 1945. See the record in that case, pp. 2-3. The record in this case shows that petitioner, like Smith, exhausted his administrative remedies by reporting for induction and refusing to take the oath. The court below considered that he exhausted his remedies, as did Smith and Estep. 66 S. Ct. 423.

Texas. [15, 20, 64] He was thereupon assigned order number 13708 by said board. [64] Petitioner timely filed a Selective Service Questionnaire on October 6, 1943, answering all the questions required of him. [28, 29-37] In series VIII he stated he was a minister of religion, did customarily serve as a minister and had been a minister of Jehovah's witnesses since August 1, 1936. [34] In said questionnaire he claimed classification of IV-D exempting him as a minister of religion under section 5 (d) of the Act. [35] Supporting this claim he filed with the board his own written statement giving details as to his ministerial work. [38-39] Also he attached an affidavit from K. K. Records, a minister of Jehovah's witnesses, attesting as to his training and status as a minister. [48] These two documents were received into evidence as Defendant's Exhibits 2 and 4.

Also filed by Cahoon was a Special Form for Conscientious Objector properly filled out, which contained additional evidence as to his training for the ministry and his activity as a minister. [50-53] Cahoon showed that he had attended the David G. Burnett Public Elementary School in Houston from 1934 to 1935 and that, in 1943, he had enrolled in a Course of Theocratic Ministry which was conducted by Jehovah's witnesses at Houston. [51] He also filed at the same time an "occupational questionnaire" in which he stated that his principal occupation was that of preaching the Gospel, and that secondarily he worked as a part-time stock clerk in a dry goods warehouse. [26]

The evidence showed that petitioner had undertaken a solemn covenant and vow as a minister of God in a ceremony held on August 1, 1936, at the First Congregational Church in Houston. [130-131] After his ordination he was given a certificate identifying him as one of Jehovah's witnesses and a minister of God. [173-176, 181] For some years previous to this ceremony, he had been making a deep study of the Bible and had consecrated his life to the ministry. [135, 159-160] Since the public ceremony of ordi-

nation on August 1, 1936, he lived up to his vows, preaching the gospel whenever he had opportunity and "living up to the tenets of the christian faith". [131, 168] However, since he had no private income or fortune and since his ministry was conducted on a non-profit basis, he found it necessary to devote part of his time to a secular occupation. [132, 133] Such secular occupation did not interfere with his preaching activities, he being able to devote approximately 30 hours per week to actual preaching as a regular minister of religion. [132]

Petitioner preached the gospel in the same manner as did Christ Jesus and His apostles, that is, by going from door to door and village to village, telling the people of and concerning the Kingdom of God. Many persons desired studies in the Bible conducted in their homes, and he arranged for and conducted a number of such studies. [39, 138] Additionally he gave discourses to the congregation of Jehovah's witnesses with which he was affiliated. [138] In May 1944 he was appointed by the Watchtower Bible and Tract Society in Brooklyn, New York [163], as presiding minister over the Sunday evening services held at Kingdom Hall on North Main Street, the congregational headquarters. [139] Approximately 150 to 200 persons usually attended this service for public worship. [171]

A number of persons testified as to the ministerial status of petitioner. His mother and father testified that they had raised their son up "in the nurture and admonition of the Lord" to be a minister. [154, 158, 160] Mr. and Mrs. Rigby said that they recognized him as a minister because of his service and relationship to the congregation. [169, 171] Lyman Dean, a direct representative from the Watchtower Bible and Tract Society in Brooklyn, New York, declared that the records of the church showed that petitioner had been serving in the capacity of a minister since 1936. [179] A. H. Knovel said that he had lived in Houston for 56 years and was fully acquainted with the background and

ministerial work being done by petitioner and that by virtue thereof he recognized him as a minister. [185] R. O. Conoley testified that he had known petitioner since his birth and that in view of his training in the Word of God and his faithful service, he recognized him as a minister in the church. [197, 199] K. K. Records, presiding minister of one of the congregations of Jehovah's witnesses in Houston, said that petitioner became a minister after his ceremony of baptism in August 1936, since which time he had diligently carried forward the work of the ministry in the church. [202, 203] Michael Kierssak said that he knew that petitioner was recognized by the church as a minister and that he had been personally associated with him in the performance of some of his ministerial duties. [208-209] Mary Elizabeth Brown testified that she was a Roman Catholic, and a neighbor of petitioner. She said that she observed him to be very active in his ministerial work and that he was recognized by Jehovah's witnesses as a minister. [216]

There was no evidence in his file disputing the evidence and claim that he was a duly recognized minister of religion, representing a religious organization known as Jehovah's witnesses and, as its legal governing body, the Watchtower Bible and Tract Society. There was no evidence that the defendant did not fit, as a minister of religion, Opinion No. 14 of National Headquarters of Selective Service System concerning the ministerial status of Jehovah's witnesses [56-60]; that he did not stand in relation to Jehovah's witnesses in the same way that the recognized orthodox clergy stand toward their congregations; that he did not perform ceremonies that are ordinarily performed by ministers of religion under the Act. This was freely admitted by the draft board officials who had handled his case. [77, 103, 110, 125]

The local board denied his claim for exemption on October 28, 1943, and placed him in Class I-A, making him

liable for training and service in the armed forces. [16, 36] The two members of the local board who testified in his behalf at his trial stated that they recognized the good faith of the claim for ministerial exemption made by petitioner, but that his qualifications did not measure up to the standard of their interpretation of what constituted a minister. [75, 78, 82] Petitioner then requested the privilege of appearing personally before the local board to discuss his classification and to present further evidence, which request was granted. [76] At this hearing he made a formal statement to the board. [54, 77] The board then changed his classification to I-A-O, which made him liable for noncombatant military service. [16] He thereupon appealed his case to the Board of Appeal for the Fourth District. [15, 36] On December 17, 1943, the board of appeal determined that Cahoon was not exempt or deferred for training and service, thus making it necessary to refer the case to the Department of Justice for investigation of his status as a conscientious objector. [36, 101] The file was sent to the Department of Justice for investigation of his status as a conscientious objector. [98] A Hearing Officer of the Department of Justice investigated and examined defendant and reported that "undoubtedly registrant is a minister within the meaning of the law. He performs all the essential functions of a minister". [46] However, petitioner waived his right to be classified in IV-E as a conscientious objector because his claim was exclusively for IV-D, minister of religion. [100]

On return of the file from the Department of Justice the board of appeal proceeded to reconsider the merits of his claim for exemption, inasmuch as he waived classification as a conscientious objector. [101] The chairman of the board of appeal stated the procedure of reconsideration to be that the board went through the file and read part of it together with a brief containing excerpts of the file prepared by the clerk. [98] The members of the board

read what part of it they wanted to read in reviewing the file. [98] Petitioner's claim for exemption from training and service, as made in his questionnaire, was read and considered. [99] Other evidence in the file was weighed by the board of appeal. [100] The chairman stated that there was no evidence before the board of appeal to indicate that petitioner was not a minister of religion as he claimed. [103] He stated that there was nothing to indicate that, in making his claim, petitioner was motivated by cowardice or selfishness. [103] He stated that the board did not think petitioner was a minister. [105] The reason was that the members of the board of appeal, in their own minds, did not believe he was a minister of religion. [106] One of the reasons advanced by the chairman for denying petitioner's claim for exemption was that petitioner had a part-time secular job as a clerk. [108] It was conceded that there was nothing in the cover sheet to indicate that petitioner was not truthful in his representations made in the cover sheet. [109] The members of the board of appeal were not able to define a "minister of religion" because of the variations in the different denominations and religions. [112]

The vice-chairman of the board of appeal testified that in consideration of the petitioner's claim for exemption the board considered information which they had outside of petitioner's file on which their conclusions were based. [116-117] Several years before petitioner's file was considered by the board of appeal, the vice-chairman prepared a brief on the ministerial status of Jehovah's witnesses, presenting an elaborate and extensive argument against their classification as ministers, which he gave to the members of the board of appeal. [118] In the brief, he reviewed certain scriptures upon which he placed his private interpretation, concluding that there were different classes of ministers and that from a Bible standpoint all members of a religious organization could not be ministers. More-

over, he showed what the practice was in the orthodox religious organizations with which he was familiar in reference to most of the members being lay members being served by a minister for each congregation. [117] This written argument briefing the question was circulated among all the members of the board of appeal two years or more before petitioner was classified by the board of appeal. [118] Although a copy of such brief was not placed in petitioner's file, its contents was considered and followed in consideration and determination of petitioner's classification. [118] When the board discovered that the petitioner was "a member of Jehovah's witnesses", it was immediately concluded upon the basis of the memorandum of the vice-chairman that petitioner was "just like a layman of some other church, or a sect". [120] Since petitioner was a member of an organization that claimed all its members were ministers, it was concluded that petitioner was not a minister of religion within the meaning of the Act and Regulations. [121] The written memorandum did not concern the petitioner. It was not written by petitioner. It concerned all of Jehovah's witnesses, as viewed by the vice-chairman of the board of appeal. [119] The memorandum caused petitioner to be considered, not as an individual but as a member of a class which class was considered not to be ministers. [119] It was concluded that inasmuch as petitioner was not a member of "the Bethel family or a member of the pioneers which are exempt under Hershey's order on November 2, 1942, and no evidence in the file being there as having his name on that list, that he was just a lay member who like all other religious organizations went around preaching and talking and trying to persuade others to their line of faith." [117] Therefore the evidence in the file was not considered as the only basis for the conclusion that petitioner was not a minister of religion. [116-117] The information which the vice-chairman had obtained in the book that he bought in St. Louis regarding

the group had its effect upon the decision in petitioner's case. [120] If petitioner had been a member of some other religion and "had a big Church on the corner", the same decision would not have been reached. [120-121, 121-122] Presumably the contents of the memorandum was considered by the members of the board of appeal because it was distributed to all of them. [118] *

The board of appeal, on August 28, 1944, denied petitioner's claim for exemption and classified him liable for training and service in the armed forces. He was given Class I-A. [17, 36, 101] No further appeal was allowed from the decision of the board of appeal. However petitioner wrote the State Director of Selective Service at Austin, Texas, requesting his intercession to review the determination. [101-102] The State Director declined to intervene in petitioner's behalf and on December 5, 1944, petitioner was ordered to report for induction on December 15, 1944, at 8 a.m. [17, 23] At the time and place specified in the order, petitioner reported for induction but refused to submit to induction and refused to take the oath, giving as his reason therefor that he had "conscientious scruples against serving in the armed forces" because he claimed exemption as a minister of religion. [17, 18] Subsequently he was arrested and charged with a violation of the Selective Training and Service Act of 1940, as amended.

How Issues were Raised

The trial court, with exception to petitioner [72, 217] overruled his motions for instructed verdict filed at the close of the Government's case [71] and again at the

* Although one member of the board stated that he considered and read the brief prepared by the vice-chairman [124-125] he stated that it had no influence on his decision of the case at all. [125] It should be observed, however, that this member reached the same conclusion as did the vice-chairman in his brief based on conversation this member had with other persons which was also hearsay evidence of which a memorandum did not appear in the file. [125-126]

close of the evidence, by which motions petitioner presented his contention that the evidence produced against him was insufficient as a matter of law to sustain a judgment of conviction and that there was no evidence of an evil, malicious or otherwise criminal intent. [217-218]

Although the jury was permitted to receive and consider the draft board file and much *de novo* evidence offered by petitioner, the trial court withdrew all of such evidence from the consideration of the jury through his charge. The jury was instructed, as a matter of law, that petitioner had been accorded a legal and constitutional treatment by the administrative agency. [221] Moreover the trial court charged the jury that it was absolutely and finally bound by the finding of the administrative agency. The jury was informed that it could not consider whether or not the administrative agency had acted without foundation of fact, in excess of its jurisdiction, unlawfully, arbitrarily or capriciously in denying petitioner his claim for exemption as a minister of religion. [220-222] The petitioner duly excepted to this charge because it amounted to an instruction of guilty and a verdict for the Government. [222] He further excepted to the court's charge depriving him of his rights under the law. [222-223] A further exception was made on the grounds that it deprived him of his right of appeal and freedom of religion and conscience contrary to the Constitution of the United States. [223] The court's charge, petitioner said, made the findings of the board of appeal final from which there was no appeal under the law on a record showing indisputably that he was a minister of religion as defined by law and which showed that there was no evidence that he was not such a minister as claimed, and it was therefore excepted to. [224] The court's charge was attacked because it deprived petitioner of his right to a jury trial and to defend himself against the indictment and to show that he was not guilty. [223, 224] Moreover, petitioner excepted to the charge because the jury was not

instructed as requested by petitioner that it could consider his good faith and conscientious belief that his covenant with Almighty God prevented him from submitting to induction because a minister of religion. [223] The special requested charge was duly submitted in writing by petitioner to the trial court. [222] Petitioner's special requested charge appears in the record. [223, 225-226]

Each and every one of the issues raised upon the trial were again urged to the trial court in petitioner's motion for new trial. [229-230] The motion for new trial was overruled, with exception to petitioner. [230] Each and every one of the issues raised upon the trial were brought forward to the Circuit Court of Appeals by assignments of error duly filed. [233-236]

Specifications of Error

Petitioner relies upon each and every one of his assignments of error as grounds for reversal of the conviction.

Reasons Relied on For Granting the Writ

The holding of the court below is in direct conflict with the holding of this Court in *Estep* v. *United States* and *Smith* v. *United States,* 66 S. Ct. 423, 425-429. The specious efforts to circumvent the decision in the *Estep* and *Smith* cases on the ground that the trial court properly applied the law of the *Estep* and *Smith* cases is without foundation in fact, contrary to the record and the law promulgated by this Court in the *Estep* and *Smith* cases. There is no distinction between those cases and the one at bar. The decision of the court below flouts the *Estep* decision of this Court.

Insofar as the holding of the court below overrules the contention of petitioner that the action of the board of appeal in depriving him of a full and fair hearing, the

decision is in conflict directly with the holding of this Court in *Bridges* v. *Wixon,* 326 U. S. 135, 156-157. Moreover, on this point the decision of the court below also conflicts with *United States ex rel. Levy* v. *Cain* (CCA-2) 149 F. 2d 328 and *Pearson* v. *United States ex rel. Horowitz* (CCA-3) 151 F. 2d 801, certiorari granted *sub nom Hobbs* v. *United States ex rel. Horowitz,* No. 947, October Term 1945, 14 L. W. 3419, May 27, 1946. Inasmuch as this case presents to the Court substantially the same question of procedural due process as is presented to the Court in the *Horowitz* case, in which the writ of certiorari has been granted, the writ should be granted in this case for the same reason.

The members of the board of appeal were prejudiced, reached a preconceived opinion about the ministerial status of all of Jehovah's witnesses, and classified petitioner as a result of bias, in violation of the Selective Service Regulations. The approval of this drastic departure from the usual and accepted course of administrative law, calls for the exercise of the power of supervision by this Court to halt the same and to correct the injustice committed against petitioner.

The approval by the court below of the trial court's refusal to grant petitioner's requested instruction asking the court to permit the jury to consider the good faith of the petitioner in determining whether or not he wilfully and unlawfully violated the law in refusing to submit to induction is directly in conflict with the decision of the United States Circuit Court of Appeals for the Tenth Circuit in *Okamoto* v. *United States,* 152 F. 2d 905, decided December 26, 1945, and the decision of this Court in *Keegan* v. *United States,* 325 U. S. 478, 493-494; *United States* v. *Murdock,* 290 U. S. 389, 394-396.

Conclusion

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit directing such court to certify to this Court for review and determination on a day certain to be therein specified, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and petitioner further prays that the judgment of said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court be here set aside and petitioner dismissed from custody or, in the alternative, the judgment be reversed and the cause remanded for a new trial not inconsistent with this Court's opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

RALPH HENRY CAHOON, JR., *petitioner*

By HAYDEN C. COVINGTON

Counsel for Petitioner

SUPPORTING BRIEF

Preliminary

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this Court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.

ARGUMENT

The board of appeal departed from the Act and Regulations governing procedure in handling petitioner's case. The members of that board considered hearsay evidence received by one of the members which was reduced to writing and circulated among the members. However the memorandum was never placed in petitioner's file. The evidence received did not relate to petitioner. It related to Jehovah's witnesses in general. The authenticity and source of the material is not revealed. The action of the board in this respect comes squarely within the rule laid down in the cases of *United States ex rel. Levy* v. *Cain* (CCA-2) 149 F. 2d 328 and *Pearson* v. *United States ex rel. Horowitz* (CCA-3) 151 F. 2d 801, certiorari granted *sub nom Hobbs* v. *United States ex rel. Horowitz,* No. 947, October Term 1945, 14 L. W. 3419, May 27, 1946.

In reviewing an appeal, the board of appeal is forbidden by the Regulations to "receive or consider any information which is not contained in the record received from the local board, except (1) the advisory recommendation from the Department of Justice under Section 627.25, and (2) gen-

eral information concerning economic, industrial and social conditions." Reg. 627.24 (b).

Inasmuch as the action of the board of appeal is *de novo* it is necessary that the file reflect the basis upon which the classification was rendered. Petitioner in this case did not know upon what basis he had been classified until his lawyer began examining the members of the board of appeal at the trial. Inasmuch as the board of appeal had made the basis of its determination on the memorandum prepared by the vice-chairman of the board, it was necessary that the material be placed in petitioner's file. Concededly that was never done. This defalcation of the board of appeal is a plain violation of the Regulations. As a matter of fact, the Regulations do not provide for the board of appeal to consider any information of any kind or character acquired by a member of such board about the status of a registrant. The local boards were set up for that purpose. Section 627.24 (b) of the Regulations explicitly prohibits the receipt and consideration by the board of appeal of "*any information* which is not contained in the record received from the local board." The only exception to this rule permitted by the Regulations is that the recommendation from the Department of Justice as to a registrant's status as a conscientious objector may be considered. This recommendation from the Department of Justice was filed and considered by the board of appeal in this case. [41-47, 113]

The Regulations also provide that the board of appeal may consider "general information concerning economic, industrial and social conditions." Section 627.24 (b) allowing consideration of these factors is limited to such information as to industrial statistics directly bearing upon the eligibility of registrants seeking occupational deferments in class II-B (man in war production) covered by section 622.22, agricultural statistics in determining whether or not farm deferments should be granted to certain

registrants claiming class II-C (man in agriculture) covered by section 622.25-1, or social conditions might be considered by the board as determining factors in deciding whether or not a registrant was entitled to class II-A, the classification given to registrants found "to be 'necessary to and regularly engaged in' an activity in support of the national health, safety, or interest", as covered by section 622.21. But nothing could be more certain than that this exception is not intended to open wide the door to allow any and all hearsay evidence or prejudicial argument to be considered by the appeal board. It is very obvious that a man's exemption as a minister is not dependent upon economic, industrial or social conditions of the community. Such classification is to be rendered solely on the basis of the registrant's devotion to Almighty God and his activity in behalf of his church. In any event, the requirement of section 623.2 that any evidence considered must be reduced to writing is still mandatory. Thus if the appeal board based its conclusion on evidence not in the file—even though its consideration of such evidence was legitimate—it is required to reduce it to writing and put it in the Cover Sheet. Otherwise, in the event an appeal is taken to the President, the basis of the determination of the appeal board would not be reflected from the file and the registrant would be deprived of substantial rights under the Act.

Although in this case an appeal as of right could not have been taken to the President, petitioner's title to constitutional due process was nevertheless infringed because he was not given a fair and impartial hearing before the appeal board and because improper, prejudicial and incompetent evidence was made the basis of his classification in the place and stead of the information contained in his Cover Sheet.

Although the Regulations do not permit a personal hearing before the appeal board, they do contemplate a full and fair consideration of the evidence *in the file*. In

considering this evidence and in making its determination thereon, the board is acting in a quasi-judicial capacity. Its determination of the issue of classification is an important proceeding. An important and substantial right of petitioner under the Act and Regulations is to be determined.

The reception of secret and anonymous evidence in this case is very similar to the conduct of a public utilities commission condemned by Justice Cardozo in *Ohio Bell Tel. Co.* v. *Public Utilities Commission* (1937) 301 U. S. 292, 300, 302, 303: "Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. . . . The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial. . . .

"From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. . . . The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

Thus papers in the appeal board's files cannot be con-

sidered as evidence in every case: it cannot take judicial notice of them. It must introduce, by specific reference, parts of reports, etc., filed with it which it wishes to treat as evidence. Otherwise, while the data may be trustworthy, Selective Service registrants are left without notice of evidence.

There is no escape from the fact that the anonymous book and the memorandum of the vice-chairman of the appeal board influenced the decision of that agency. [120] To what extent, it is impossible to say. This brings the case squarely within the rule of the Supreme Court of the United States in *Bridges* v. *Wixon*, 326 U. S. 135, 156, where it is said:

" . . . The alien does not prove he had an unfair hearing merely by proving the decision to be wrong . . . or by showing that incompetent evidence was admitted and considered. . . . But the case is different where evidence was improperly received and where but for that evidence, it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing. . . . "

The reception of improper evidence was one of the things condemned by the Supreme Court of the United States in *Morgan* v. *United States*, (1936) 298 U. S. 468, 479-481, wherein the Chief Justice Hughes said:

" . . . It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. . . .

" . . . The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.

The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

Whether a hearing is fair must be determined by the character of the hearing and not by that of the classification based thereon. This question is open to full judicial inquiry and is in no sense concluded by assertion of the administrative agency in question that a fair hearing was given. In this case the undisputed evidence before the lower court showed that the appeal board had received grossly incompetent and prejudicial evidence. Thus it was the duty of the trial court to instruct the jury to acquit petitioner.

Section 623.1 (c) provides: "In classifying a registrant there shall be no discrimination for or against him because of his race, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice." In this case, defendant was discriminated against and was treated unfairly because he was one of Jehovah's witnesses. The members of the board testified that in looking over defendant's file it was "discovered that he was a member of Jehovah's witnesses," and it was this discovery that apparently was responsible for the I-A classification given petitioner. Under the circumstances, this hearing amounted to no hearing at all under the Act and Regulations.

The testimony of members of the appeal board indicated that they were prejudiced against Jehovah's witnesses and were biased in their conclusions. Vice-chairman Morris had

already reached his conclusions on the basis of the information he obtained from the book he had purchased. [120] Dr. John T. Moore said that he had previously received information concerning Jehovah's witnesses by talking to persons who had conversed with Jehovah's witnesses and by talking to them himself.

A hearing by a biased judge or board is not in conformity with due process of law which implies a tribunal board impartial and mentally competent to afford a fair hearing. The undisputed evidence in the record shows that the appeal board was not non-partisan, nor was it free from bias and prejudice. Defendant's case was considered and determined on the reputation of Jehovah's witnesses rather than upon own merits of his own case. This in itself is a substantial denial of due process.

The record showed that petitioner was a regular and duly ordained minister of Jehovah's witnesses and the Watchtower Bible and Tract Society, Inc., recognized religious organizations. The undisputed evidence showed that he regularly performed his duties as such, devoting approximately thirty hours per week to regular teaching and preaching of the doctrines of Jehovah's witnesses. He stood in relation to the local congregation of Jehovah's witnesses in the same way as did the clergy of the orthodox religious denominations. In addition to preaching sermons regularly, he performed missionary evangelistic work.

The administrative agency cannot arbitrarily determine that one is not a minister of religion, even though of an unorthodox and dissentient faith, if he is recognized by his organization as a regular or duly ordained minister, and there is no substantial evidence that he fictitiously claims to be a representative of the organization or that he is not such a minister, or that he is not so recognized. It is the mandatory duty of the draft boards to recognize such ministerial status and to grant exemption allowed by the Act and Regulations for ordained ministers of religion.

Ex parte Cain, 39 Ala. 440, 441; *In re Reinhart,* 9 Ohio S. & C. P. Dec. 441, 445; *Town of Londonderry* v. *Town of Chester,* 2 N. H. 268; *Kidder* v. *French,* N. H., Smith, 155, 156; *Haggin* v. *Haggin,* 53 N. W. 209, 211, 35 Neb. 375; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Baldwin* v. *McClinch,* 1 Mo. (1 Green) 102, 107. *Lehr* v. *United States,* 139 F. 2d 919, 921-922.

This point has been exhaustively argued in the joint brief for petitioners in *Smith* v. *United States,* No. 66 October Term 1945, and *Estep* v. *United States,* No. 292, October Term 1945, at pages 130-190, to which reference is here made. That argument is incorporated here as though copied at length herein.

At the close of all the evidence the defendant moved the court for a directed verdict of "not guilty", for various reasons. [216-217]

It is a fundamental rule that if the undisputed evidence shows that defendant is not guilty of the offense charged and upon another trial the evidence would be substantially the same or could not be different, it is the duty of the appellate court to reverse, set aside the verdict, and render a judgment that the indictment be dismissed, rather than to set aside the verdict and order a new trial. This is especially true where the court below does not have jurisdiction. *A fortiori,* if the local board, upon whose order the indictment is based, is without jurisdiction, the rule would be the same. This case is therefore governed by *Smith* v. *United States,* 150 U. S. 50, and *Baltimore Carolina Line* v. *Redman,* 295 U. S. 654.

The efforts on the part of the court below to hold as harmless error the action of the trial court in striking all of the evidence received in respect to the illegality of the administrative action from consideration of the jury and in charging the jury that it could not consider the illegality of the administrative determination and the denial of a full and fair hearing is erroneous. The court below at-

tempted to hold that such action was harmless error because the trial court followed the rule in reference to the scope of judicial review of draft board determinations in *Estep* v. *United States,* 66 S. Ct. 423. The trial court did not follow the rule of this Court announced in *Estep* v. *United States.* To the contrary, the trial court followed the rule of *Falbo* v. *United States* (320 U. S. 549), which conclusion was erroneous and prejudiced the petitioner. It cannot be said that the action of the trial court was harmless error. It was prejudicial error for the court below to hold that the action of the trial court was harmless to petitioner. A similar effort was attempted by the court of appeals in the case of *Smith* v. *United States,* 148 F. 2d 288. (See the last point discussed in that opinion.) This Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. There the trial court failed to pass upon the issue raised. It refused to permit the jury to consider the issue. The questions for determination by the court and jury were limited to whether or not the defendant complied with the order. The same failure to exercise the judicial function is prevalent here. The trial court did not pass upon the merits of petitioner's defense. Therefore this case should be reversed and sent back for a new trial just like the *Smith* case was reversed and sent back for a new trial.

Even if no error was committed by the trial court in denying petitioner's motion for directed verdict, nevertheless the action of the court, in striking all the testimony received upon the trial with reference to denial of a full and fair hearing and the classification in excess of the jurisdiction of the board of appeal, from the consideration of the jury was reversible error and entitles the petitioner in this case to a new trial. The error concurred in by the opinion of the court below is satisfactorily answered by the concluding language of the opinion of the Court in *Estep* v. *United States* (66 S. Ct. 423, 429): "Since the petitioners

were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."

The trial court permitted the petitioner to testify extensively as to his reasons for not submitting to induction. He said that since he was a minister of religion and that ministers of religion were exempt from training and service, he believed the order of the board to be void and that he could not be required to submit to induction. He further said that as a faithful servant of Almighty God he could not break his covenant with Jehovah God by discontinuing preaching in his congregations, because such would result in his everlasting death. [146-148]

The term "knowingly" as used in the Selective Training and Service Act is synonymous to the word "wilfully". It does not mean "voluntarily" or "unintentionally". It means prompted by a bad faith or with an evil intent or for an illegal purpose. It means without legal justification. If the petitioner had legal justification or reasonable grounds for belief that he was legally justified in not submitting to induction, then it cannot be said that he illegally, knowingly, and unlawfully failed to perform a duty required of him under the Act.

The petitioner requested the court to instruct the jury to consider his good-faith belief that he was not required to submit to induction, that he was exempt from all duty under the Act and that the order was void. [222, 225] The court refused the special charges. [222] The petitioner excepted. [222] The court held that the honest good-faith belief of the petitioner was not material as defense to the indictment.

The petitioner relies on *Keegan* v. *United States,* 325 U. S. 478, 493-494, to support the proposition that the jury should have been charged to consider his good faith as requested in the special requested instruction. Petitioner had to report in order to exhaust his administrative rem-

edies. His refusal to take the oath was based on his belief that he was not required to submit to induction and that he could not do so without violating God's law. "One with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the law shall not be obeyed." *

In support of this proposition petitioner also depends upon *United States* v. *Murdock*, 290 U. S. 389, 394-396. There the defendant was convicted for wilfully and knowingly failing to supply information as to his income. The grounds for the refusal were that he believed he was exempt on the items inquired about and that the Constitution guaranteed him the right to decline to incriminate himself. This reasonable belief of exemption, which was erroneous, and the fear that he might incriminate himself, entitled the jury to consider that if he had good faith he could not be convicted of wilfully refusing to give the information.

If a selectee is ill, had an accident, was prevented by storm from appearing or by mistake, he could show that in defense. (*United States* v. *Hoffman* (CCA-2) 137 F. 2d 416; *United States* v. *Grieme* (CCA-3) 128 F. 2d 811) Similarly, good-faith belief that the order is invalid is also permissible as a defense.

On the whole record, it appears that petitioner reported for induction but refused to submit to induction. The indictment charged petitioner with "failure to report and submit himself to induction". [9] The clerk of the local board testified that the records showed that petitioner reported for induction on December 15, 1944, as commanded but that he did not submit himself to induction. [17] A written statement made by the assistant clerk, which is a part of the draft board file, shows that petitioner "did present himself at this Board at the specified time. He refused, however, to be inducted, for the reason that he

* See also Okamoto *v.* United States (CCA-10) 152 F. 2d 905.

has conscientious scruples against serving in the armed forces, and he claims exemption as a minister of the gospel." [18] The clerk further testified that petitioner "appeared and passed the physical examination and was duly accepted, physically". [24] Petitioner testified that he appeared at the time and place stated in the order to report for induction. [46] He stated that he knew he was ordered to do general military service. [146-147]

In response to his counsel in the trial court he declared he could not take the oath: "Q. What is the reason why you did on that occasion fail and refuse to take the oath and thereby submit yourself to induction? A. Because I previously made an oath or consecration of my life to Almighty God and I could not go back on that oath because that was an eternal oath; an oath I could not reject. Q. Could you at that time have taken the oath as a member of the Army of the United States in good faith as to the United States? A. No. I could not." [147]

In response to the questions propounded by the prosecuting attorney in the trial, he stated that he was ordered to report for induction: "Q. Did you receive that order? A. I did. Q. Did you report for induction as ordered? A. I reported, yes, sir. Q. Did you submit yourself to induction? A. No, sir, I did not." [150]

The court charged the jury: "it is not insisted by the defendant that he appeared for the purpose of being inducted into the army because he said he did not intend to be inducted when he went there. So that I will repeat again, that if you find under this order which I charge you is a vaild and legal order, that he failed to appear to be inducted into the army, he would be guilty under the indictment." [222]

It is presumed that there was a regularity of administrative proceedings following the issuance of the order to report for induction and that the petitioner complied with Sections 623.21 and 633.22 and reached the point where he

could be required to submit to induction, because unless he was ever ordered to submit to induction it cannot be said that he refused to submit to induction.

There is nothing in the record to dispute the statements of the various witnesses and the documents that petitioner refused to submit to induction and that he was duly accepted for training and service. It is at least enough evidence to warrant this Court in holding that the petitioner did precisely as did Estep and Smith.

However, if it is assumed upon the record in this case that petitioner went no further than the local board and actually refused to report for induction, then, nevertheless, he completed the selective process and exhausted his administrative remedies when he was accepted by the armed forces for training and service upon his preinduction physical examination. One who has been accepted by the armed forces upon a preinduction physical examination has exhausted his administrative remedies so as to qualify for judicial review.

Section 3 (a) of the Selective Training and Service Act of 1940 (50 U. S. C. A. App. § 303) in part provides: " . . . no man shall be inducted . . . until he is *acceptable* to the land or naval forces . . . and his physical and mental fitness for such training and service has been satisfactorily determined." (Italics added) *

The administrative process beginning "with registration with the local boards" ends "when the registrant is *accepted* by the Army, Navy or civilian public service camp." *Falbo* v. *United States,* 320 U. S. 549. Section 629.1 of the Regulations provides that every registrant must be given a preinduction physical examination.

"The Selective Service Regulations also draw a distinction between acceptance (or being found acceptable) by the Army and induction." (*Billings* v. *Truesdell,* 321 U. S. 542, 553)

* Billings v. Truesdell, 321 U. S. 542, 546.

"These regulations thus suggest that induction follows acceptance and is a separate process." (*Ibid.* p. 554)

"This takes the place of the earlier system whereby selectees were first inducted and then given, if they desired, furloughs to attend to their personal affairs." (*Ibid.* p. 555)

"We mention these recent regulations because they perpetuate the distinction between acceptance or being found acceptable and induction which appeared in the regulations when Billings reported at the induction station." (*Ibid.* p. 555)

The matter of acceptance upon a preinduction physical examination terminating the selective process and constituting an exhaustion of the administrative remedies has been thoroughly discussed in other cases filed with this Court. See the petition for writ of certiorari in the case of *George William Dodez* v. *United States of America,* No. 1103 October Term 1945 (certiorari granted May 6, 1946, 14 L. W. 3386), pages 13-18; brief for petitioner in *Taze Hamrick Gibson* v. *United States of America,* No. 221, October Term 1945, pages 16-24.

It is acceptance by the armed forces that completes the selective process. One who has been accepted by the armed forces has exhausted his administrative remedies so as to qualify for judicial review. *Estep* v. *United States,* 66 S. Ct. 423. That acceptance constitutes the end of the selective process (and was so considered by the Court in the *Estep* case), as exhausting administrative remedies, is exemplified in the concurring opinion of Mr. Justice Frankfurter, where he said: "The command of Congress makes the decision of the board no less final after the registrant has submitted to the pre-induction examination than before such submission." It must be conceded that petitioner took the preinduction physical examination and had been accepted by the armed forces for training and service.

Assuming, for the purpose of argument only, that the record in this case does not show that petitioner went as far as did Smith and Estep and, also assuming, *arguendo,* that acceptance upon a preinduction physical examination does not constitute an exhaustion of the administrative remedies—which petitioner contends does exhaust the administrative remedies—sufficiently to entitle him to challenge the legality of the classification under the doctrine of the *Estep* decision, there is, nevertheless, a different problem presented here.

The error of the appeal board in considering improper and prejudicial evidence constitutes a substantial denial of the right upon appeal. The act of the appeal board was a denial of due process and was tantamount to an outright denial of his right of appeal. Therefore the order upon which the indictment is based is void the same as if no order had been issued at all. Under these circumstances the courts have held that the illegality of the order can be considered in defense to the indictment and that the doctrine of *Falbo* v. *United States supra* does not apply. *Tung* v. *United States* (CCA-1) 142 F. 2d 919; *United States* v. *Peterson* (USDC-ND Calif.) 53 F. Supp. 760; *United States* v. *Lair* (USDC-ND Calif.) 52 F. Supp. 393. Cf. *Ex parte Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for ceritorari which was available to it.

The conviction under the indictment being based upon undisputed evidence showing a violation of the rights of the petitioner under the Act, the Regulations and the Constitution, the court below should have reversed the judgment of conviction and ordered the indictment dismissed and petitioner discharged *or,* in the alternative, for procedural errors committed against petitioner by the trial court, ordered the cause remanded for a new trial.

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed; and petitioner further prays that the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner be reversed and petitioner discharged or, in the alternative, that the judgments be reversed and a new trial ordered.

Respectfully submitted,

HAYDEN C. COVINGTON

Counsel for Petitioner